IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA696/2018
[2020] NZCA 305

BETWEEN	COLIN GRAEME CRAIG Appellant
AND	CAMERON JOHN SLATER First Respondent
	SOCIAL MEDIA CONSULTANTS LIMITED Second Respondent

Hearing:	10 and 11 March 2020
Court:	Kós P, Gilbert and Wild JJ
Counsel:	J G Miles QC and T F Cleary for Appellant W Akel and E A Keall as counsel assisting the Court
Judgment:	23 July 2020 at 9.30 am

JUDGMENT OF THE COURT

A The appeal is allowed, to the extent set out at [131] below.

B The appellant is entitled to costs in this Court for a standard appeal on a band A basis plus any disbursements. We certify for second counsel.

C Damages are remitted for redetermination in the High Court, along with costs therein, in light of the terms of this judgment.

REASONS OF THE COURT

(Given by Kós P)

[1] Mr Craig was an aspiring politician.[1] From 2011 to 2015 he was the leader of a small political party, the Conservative Party. The party contested the 2011, 2014 and 2017 general elections. It gained modest success at the first two, but failed to cross the five per cent threshold that would have earned it parliamentary seats.

[2] From 2011 until 2014, Rachel MacGregor was the press secretary for Mr Craig and the party. It is evident that an attraction developed between the two, part spiritual, part romantic and part sexual. Some sexual activity (short of intercourse) occurred between them on one occasion, on the night of the 2011 general election. Ms MacGregor then came to her senses and sought to revert to a professional relationship only.[2] The same cannot be said of Mr Craig. He continued to write Ms MacGregor lengthy personal letters and poems.

[3] Following Ms MacGregor's resignation in September 2014, she alleged that Mr Craig had sexually harassed her and that she had not been paid in full. A mediated, confidential settlement ensued in which Mr Craig agreed to pay Ms MacGregor $16,000 and forgive a debt of some $19,000, and Ms MacGregor agreed to withdraw her sexual harassment claim.

[4] Information about Mr Craig's conduct towards both Ms MacGregor and the party board were leaked to Mr Slater, a conservative activist who ran a now-defunct blog site called *Whaleoil*.[3] Mr Slater's sources were two. First, a party board member, John Stringer, who harboured reservations about Mr Craig, and had his own ambitions. Secondly, a friend of Ms MacGregor's, Jordan Williams. He was another conservative activist who, for reasons best known to himself, felt at liberty to impart his friend's confidences. All three have since ended up in defamation proceedings with Mr Craig.[4]

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1 The facts are set out in very considerable detail in the judgment below: *Craig v Slater* [2018] NZHC 2712 [High Court judgment]. A useful summary is to be found at [1] to [16]. It is necessary for present purposes only to summarise the most essential facts.

2 At [79].

3 In September 2014, *Whaleoil* had nearly 5 million page views and 285,639 users.

4 Mr Williams brought proceedings against Mr Craig for defamation, resulting in a jury award of $1.27 million. This verdict was set aside by the High Court in *Williams v Craig* [2017] NZHC 724, [2017] 3 NZLR 215, reinstated as to liability by this Court in *Williams v Craig* [2018] NZCA 31, [2018] 3 NZLR 1, set aside again by the Supreme Court in *Craig v Williams* [2019] NZSC 38, [2019] 1 NZLR 457, and then settled out of court. At the same time, Messrs Craig and Williams settled proceedings in defamation filed against Mr Williams by Mr Craig. Mr Craig filed

[5] On 19 June 2015, Mr Craig announced at a press conference that he was standing down as party leader. From 19 June 2015 until 29 July 2015, Mr Slater made various statements about Mr Craig on *Whaleoil*, *NewsTalk ZB* and on the *One News Now* website. The relevant statements are set out in a schedule appended to this judgment.

[6] The essence of Mr Slater's statements was that Mr Craig had sexually harassed Ms MacGregor (including by sending her sexually explicit text messages or "sexts"), put her under financial pressure to sleep with him, paid her a six-figure sum in settlement, sexually harassed at least one other woman, lied to the party board about his conduct and how much he had paid Ms MacGregor, and lied to the media about why two board members had left the party.

[7] In response Mr Craig held another press conference, on 29 July 2015, and published a pamphlet entitled "Dirty Politics and Hidden Agendas". It was subtitled "Colin Craig vs The Dirty Politics Brigade … and their Campaign of Lies", and sub-subtitled "A story that had to be told". The "Brigade" was identified as Messrs Williams, Slater and Stringer, who were "the schemers in plot against Craig". Copies were delivered to 1.6 million letterboxes.

[8] Mr Craig commenced this proceeding against Mr Slater and an associated company, Social Media Consultants Ltd. Mr Slater counterclaimed on the basis the pamphlet defamed him.

Judgments

[9] In a lengthy and comprehensive judgment of some 249 pages, delivered in October 2018, Toogood J held that Mr Slater was liable in defamation for two publications: that Mr Craig had placed Ms MacGregor under financial pressure to

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proceedings in defamation against Mr Stringer and Mr Stringer filed proceedings in defamation against Mr Craig. Mr Craig's claim and parts of Mr Stringer's claim were stayed by the High Court in *Craig v Stringer* [2019] NZHC 1363, [2019] 3 NZLR 743 and this stay has since been set aside by this Court in *Craig v Stringer* [2020] NZCA 260. The remainder of Mr Stringer's claim was determined against Mr Stringer by the High Court in *Stringer v Craig* [2020] NZHC 644. Mr Craig filed proceedings in defamation against Ms MacGregor but did not serve them on her until she learnt of the proceedings and filed a counterclaim for defamation. The High Court determined that Mr Craig and Ms MacGregor defamed each other to a limited extent in *Craig v MacGregor* [2019] NZHC 2247.

sleep with him, and that he had sexually harassed at least one other victim.[5] The other publications were either not defamatory, or protected by defences of truth, honest opinion or responsible public interest communication. The Judge declined to award Mr Craig damages: his reputational loss was caused almost entirely by his own actions, and a declaration would be adequate vindication.

[10] Mr Slater's counterclaim was dismissed on the basis Mr Craig's pamphlet was a justifiable response to an attack made by Mr Slater and thus protected by qualified privilege.

[11] In a separate costs judgment, itself of some 33 pages, the Judge held that, as Mr Craig's defamation claim had largely failed, costs would on balance be awarded to Mr Slater, albeit on a reduced basis.[6] On the counterclaim he held each party succeeded and failed in more or less equal measure. Costs on the counterclaim would lie where they fell.

Appeal

[12] Mr Craig appeals the judgments below on the basis that the Judge erred in seven respects. The errors alleged are indicated in the seven issues set out below at [14].

[13] Mr Slater is now a bankrupt, and his company is in liquidation. Neither participated in the appeal. We appointed Mr Akel as counsel assisting, to act as contradictor.

Issues on appeal

[14] Seven issues arise on this appeal:

(a) Did the High Court err in finding five publications did not bear the meanings alleged by Mr Craig?

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5 High Court judgment, above n 1, at [18].
6 *Craig v Slater* [2019] NZHC 1269 [Costs judgment].

(b) Did the High Court err in finding certain meanings not defamatory?

(c) Did the High Court apply the correct approach to determining whether publications were "true, or not materially different from the truth"?

(d) Did the High Court err in finding the defence of honest opinion applied to publication 16?

(e) Did the High Court err in finding the responsible public interest communication defence applied to publications 1, 6, 7, 9 and 16?

(f) Did the High Court err by failing to award Mr Craig damages?

(g) Did the High Court err in its costs judgment?

Issue one: Did the High Court err in finding five publications did not bear the meanings alleged by Mr Craig?

[15] For a statement to bear a (defamatory) meaning alleged, two fundamental pre-conditions must be met. First, it must be the meaning an ordinary, reasonable person would draw or infer from the words, taken in their context and in light of generally known facts.[7] Secondly, that meaning must be pleaded.[8]

[16] Whether a statement is capable of bearing a particular meaning is a question of law; whether it in fact conveys that meaning is a question of fact. Here, both tasks fell to the Judge, it being a Judge-alone trial. This is a general appeal, and it is for this Court to reach its own conclusion on whether the statements can bear the meaning alleged. It is in as good a place to do so as the trial Judge. The observations of Lord Kerr in *Stocker v Stocker*, counselling "disciplined restraint" in differing from a trial Judge on meaning,[9] need to be read in light of the more intrusive standard of

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7 *New Zealand Magazines Ltd v Hadlee (No 2)* [2005] NZAR 621 (CA) at 625.

8 *Broadcasting Corporation of New Zealand v Crush* [1988] 2 NZLR 234 (CA) at 237; and *Television New Zealand Ltd v Haines* [2006] 2 NZLR 433 (CA) at [56].

9 *Stocker v Stocker* [2019] UKSC 17, [2020] AC 593 at [59].

review on a general appeal in New Zealand commanded by *Austin Nichols & Co Inc v Stichting Lodestar*.[10]

Publication 4 — deceived the board

[17] Publication 4 was a *Whaleoil* post on 20 June 2015. The particular words at issue referred to "financial issues, contractual issues, sleight-of-hand with loans, GST rebates and other strategic trickery". In context they were attributable to Mr Craig. Mr Craig pleaded that the natural and ordinary meaning of those words was that Mr Craig "[t]ricked, misled and deceived the [board] in relation to loans and GST rebates".

[18] The Judge held the statement did not in fact bear that meaning. He said it only contained "vague insinuations" that Mr Craig was "engaged in some unspecified way in irregular dealings".[11] We would accept Mr Miles' submission that insinuations as to irregularity in financial dealings may be enough to found defamation, and that the ordinary reader, whose eyes the Court sees through for these purposes, has a considerable capacity to read between the lines.[12]

[19] The pleading here is however a narrow one. It is that the ordinary reader would draw from the words that Mr Craig had tricked, misled and deceived *the board* in relation to loans and GST rebates. We agree with the Judge that, read in the context of the post as a whole, that particular, extended meaning would not readily commend itself to the ordinary reader. It is not therefore the natural and ordinary meaning of the words, as pleaded. This challenge therefore fails.

Publication 10 — a danger to women?

[20] Publication 10 was a *Whaleoil* post six days later, on 26 June 2015. The essential words are that "there is at least one other victim out there with similar circumstances", that "Colin Craig is just a ticking timebomb", that "[g]uys like this never have just one victim no matter how hard they try to keep everyone silent" and

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10 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.
11 High Court judgment, above n 1, at [497].
12 *New Zealand Magazines Ltd v Hadlee (No 2)*, above n 7, at 625.

that "no one brought down Colin Craig other than himself through his extremely poor and disgusting behaviour towards women".

[21] The Judge rejected one of Mr Craig's pleaded meanings — that the statement meant Mr Craig "[i]s a danger to women". The Judge said he was not persuaded that the statement carried that imputation.[13] He agreed with Mr Craig that it carried imputations that he had seriously sexually harassed at least one victim other than Ms MacGregor and had behaved in an extremely poor and sexually disgusting way towards women.

[22] Mr Miles submits the statements that Mr Craig treated women in a disgusting manner and victimised multiple women would lead an ordinary person to conclude Mr Craig is a danger to women. That was the clear implication, and the meaning an ordinary person would take away from the statement.

[23] Mr Akel submits the contextual focus of publication 10 is on a second complainant. The Judge was entitled to find that the sting of the defamation was confined to the narrower meaning that Mr Craig sexually harassed at least one other woman.

[24] We agree with Mr Miles. First, we consider that that further meaning is the natural extension of the meanings the Judge had already reached: the serious sexual harassment of at least one other person besides Ms MacGregor, and behaviour of an extremely poor and sexually disgusting manner towards women. Secondly, perhaps overlooked were the further words that Mr Craig "is just a ticking timebomb". An ordinary reasonable reader would infer from that description of Mr Craig, in combination with those other meanings, that he is at risk of repeating these actions, making him a danger to women. This challenge succeeds.

Publication 14 — electoral honesty?

[25] Publication 14 was a *Whaleoil* post on 1 July 2015. It was headed, "20 Fair Questions for Colin Craig". In one of those questions Mr Slater asked:

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13 High Court judgment, above n 1, at [551].

> Are you confident you have been honest in your filing of all Electoral Returns in accordance with the Act, and have you been totally honest about amounts and invoicing to keep electorate campaigns under cap?

[26] Mr Craig pleaded that the natural and ordinary meaning of those words was that were "reasonable grounds to suspect Mr Craig of being dishonest in filing his electoral returns and lying about the amounts spent on his electoral campaign" and that "in fact Mr Craig's spending exceeded the legal limits".

[27] The Judge rejected those meanings. He started by endorsing the English practice (itself endorsed by our Supreme Court in its *APN New Zealand Ltd v Simunovich Fisheries Ltd* decision) of tripartite "tiers of meaning", which are particularly germane to imputations arising from published questions:[14]

> The New Zealand courts have followed the English practice of referring to three tiers of possible meaning that may arise out of allegations. These include:
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> (a) that the claimant is guilty of the misconduct (tier 1);
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> (b) that there are reasonable grounds to suspect that the claimant is guilty of misconduct (tier 2); or
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> (c) that the claimant is being investigated, or there are grounds to investigate the conduct in respect of the misconduct (tier 3).

The Judge went on to note that these were not absolute categories, as the Supreme Court had noted.[15] Nor were they tiers of seriousness. Meaning still depended on the precise meaning of the words, in their context.

[28] The Judge found the published question imputed a statement of fact that there were grounds to investigate Mr Craig's conduct regarding electoral returns and spending, a "tier three" imputation.[16] But that was not the meaning Mr Craig pleaded, which was plainly of a tier two imputation.

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14 High Court judgment, above n 1, at [572]; citing *APN New Zealand Ltd v Simunovich Fisheries Ltd* [2009] NZSC 93, [2010] 1 NZLR 315 at [15].

15 At [573], citing *APN New Zealand Ltd v Simunovich Fisheries Ltd*, above n 14, at [16].

16 At [575].

[29] Mr Miles submits this is an impermissible use of classification to dictate meaning, which the Supreme Court counselled against in *Simunovich.*[17] Read in the context of other questions implying grounds to suspect impropriety, an ordinary reader would understand the question as clearly imputing that Mr Craig had breached the Electoral Act 1993 or that there were at least reasonable grounds to suspect he had.

[30] Mr Akel submits, in response, that the Judge was correct to reject the pleaded meaning as it was not a tier three meaning. The statement had a different topic to other questions posed, and an ordinary reader would not turn his or her mind to the subtleties of layers of meaning.

[31] We think Mr Miles' complaint is well made. "Tiers of meaning" analysis is a convenient method to identify the essential sting imputed, the meaning alleged and precisely what the defendant must justify or otherwise defend. But the technique is subject to a number of significant qualifications. The first is that the tiers are not themselves framed in terms an ordinary reader is likely to use.[18] Partly for that reason, the second qualification is that, as the Supreme Court observed, "Meanings in different tiers may shade into each other, rather than always falling neatly into one compartment or another".[19] Indeed, there are gradations within tiers: tier three encompasses both the alleged fact of a third party investigation (from which a reader might or might not infer a meaning that the authorities had grounds to investigate) and an imputation of the existence of *independent* grounds for the authorities *to* investigate.[20] The third qualification is that meaning is obviously more than the isolated parsing of a sentence. It asks what meaning an ordinary reader would draw *in context*, and from the publication taken as a whole. And context, particularly, may shift the imputation from one tier to another. That is so in this case.

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17 *APN New Zealand Ltd v Simunovich Fisheries Ltd*, above n 14, at [16].

18 See, for example, the reservations expressed by Gray J in *Charman v Orion Publishing Group Ltd* [2005] EWHC 2187 (QB) at [17]: "the ordinary reasonable reader would not use legalistic concepts such as the existence of 'reasonable grounds for suspicion' when articulating his or her impression of the meaning conveyed by the words complained of. There is in my opinion much to be said for the use of vernacular expressions such as 'probably guilty' or 'a bit suspicious' to indicate the shade of meaning to be contended for at trial".

19 *APN New Zealand Ltd v Simunovich Fisheries Ltd*, above n 14, at [16].

20 Matthew Collins *Collins on Defamation* (Oxford University Press, Oxford, 2014) at [8.17]–[8.18].

[32] Here the question complained of was the third within a set of twenty. The first and second ask why Mr Craig lied about inappropriate behaviour with Ms MacGregor. Later questions ask about other alleged untruths, half-truths or concealed misdeeds relating to party funding, expenditure, membership and the existence of a sexual harassment claim before the Human Rights Commission. The tenor of the article is that in numerous respects, Mr Craig had acted dishonestly.

[33] On its own, question three might have conveyed a tier three (grounds to investigate) meaning. In context, however, an ordinary reader would infer that the questioner had a factual basis for asking the question going beyond mere enquiry. And, that reasonable grounds existed to suspect Mr Craig of being dishonest in filing his electoral returns, declaring his expenditure, and exceeding lawful expenditure limits. This ground of challenge succeeds.

Publications 15 and 17 — repetitions

[34] Publication 15 was a *Whaleoil* post of 8 July 2015. It reports a leaked letter from Mr Craig to party members, stating that allegations of sexual harassment against him "are false and have been withdrawn". The post states, "I haven't withdrawn any of my allegations … In fact I stand by everything I have stated".

[35] A subsequent post, dated 29 July 2015, followed announcements that Mr Craig was suing Messrs Stringer and Slater for defamation. Mr Slater stated, "… the truth is quite the best defence … we have only dealt in verifiable fact". These words were then repeated on the *One News Now* website later that day, that being publication 17.

[36] Mr Craig pleaded that each statement thereby repeated each and every meaning in all prior statements complained of and carried the imputation that the defamatory allegations conveyed by those meanings were true.

[37] The Judge held these statements did not repeat each and all of the meanings of Mr Slater's earlier defamatory statements as a reader would need a "compendious

knowledge" of Mr Slater's allegations against Mr Craig to draw any real meaning from either statement.[21]

[38] Mr Miles submits the Judge erred as a significant number of readers were aware of the widely publicised allegations against Mr Craig, led by Mr Slater, and would understand Mr Slater's words as repeating earlier defamatory stings. He submits that the Judge's approach would significantly undermine the repetition rule — which we discuss below.[22]

[39] Mr Akel, contradicting, submits the reasonable reader of social media would not link Mr Slater's vague statements back to his prior allegations in prior publications given the sheer volume of mass media at the time. It does not, therefore, undermine the repetition rule, which depends upon proximity and connection.

[40] The repetition rule is more usually applied in the case of a secondary defendant (such as the news media) reporting the primary defendant's statement.[23] But it is capable of applying to self-repetition by the primary defendant. That was the situation in *Jennings v Buchanan* where the defendant, a Member of Parliament, first made statements defaming the plaintiff in the House (which attracted absolute privilege) but then said in a press interview that he "did not resile" from his claims about the plaintiff.[24] The plaintiff pleaded that the defendant had "adopted, repeated and confirmed as true" the protected statement. The Privy Council held that the protection of absolute privilege did not extend to the extra-parliamentary press interview. Lord Bingham observed:[25]

> It is clear that at common law every republication of a libel is a new libel and a new cause of action. The republisher of the libel may or may not be the same as the original publisher. The republication may or may not be made on an occasion enjoying any privilege (whether absolute or qualified) attaching to an earlier publication or republication. It is further clear … that a defendant may be liable for republishing by reference to a statement originally published on another occasion by himself or another.

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21 High Court judgment, above n 1, at [586] and [594].
22 Below at [40].
23 See generally Collins, above n 20, at [6.67].
24 *Jennings v Buchanan* [2004] UKPC 36, [2005] 2 NZLR 577 at [2].
25 At [12].

[41] His Lordship went on to refer to the judgment of Hampel J in *Beitzel v Crabb*, a case of republication by reference, noting the existence of a "sufficient temporal and substantive connection" between the first (protected) publication and the second (referential) one, to constitute a defamatory publication by adoption.[26]

[42] We think that is the right approach, the question being what a reasonable, ordinary reader would draw in context from the apparent endorsement by the defendant of his earlier statement. In most cases this is of little practical significance: the plaintiff simply sues on the former statement. But in *Jennings v Buchanan*, that statement was protected. In other cases the former statement may have had a smaller or different audience to the later one. In this case, Mr Slater's comments were picked up by a television news website (publication 17), which had a far greater reach than *Whaleoil.*

[43] Applying that approach, we agree with the Judge that a reasonable reader would not draw anything material from publication 17, asserting that the defamatory statement would be justified. It is too disconnected in content, and somewhat disconnected in time, for that reader to draw a particular adverse meaning against Mr Craig (other than that his claims may fail — which is not the meaning pleaded). The same is not the case however with publication 15. That explicitly refers to past allegations of sexual harassment against Mr Craig, and states, "I haven't withdrawn any of my allegations … In fact I stand by everything I have stated". It would be taken by the reader to be an allegation that Mr Craig had indeed sexually harassed women. This challenge succeeds in relation to publication 15 only.

Issue two: Did the High Court err in finding certain meanings not defamatory?

[44] For a meaning to be defamatory, it must tend to affect the claimant's reputation adversely. And it must do so in more than a minor way. That qualification was contended for by Mr Miles, for the appellant. Mr Akel queried it. It reflects the serious harm threshold developed in United Kingdom courts, and since legislated for there.[27]

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[26] At [14], quoting *Beitzel v Crabb* [1992] 2 VR 121 (VSC) at 128.

[27] See *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414 (QB), [2011] 1 WLR 1985; and *Lachaux v Independent Print Ltd* [2019] UKSC 27, [2019] 3 WLR 18 at [12], regarding the application of the test under s 1 of the Defamation Act 2013 (UK).

The High Court in New Zealand has approved and adopted that qualification, but it has not yet been considered by this Court.[28]

[45] We approve adoption of the "more than minor" harm requirement in New Zealand common law, for three reasons. The first is that damage to reputation is an essential element of the cause of action of defamation, for the reasons Tugendhat J canvassed in *Thornton v Telegraph Media Group Ltd*.[29] The fact that damage is rebuttably *presumed* (in most cases) does not alter the fact that damage to reputational credit remains an element of the tort. Principle and proof should not be confused. Secondly, a threshold of this kind is a necessary consequence of the right to freedom of expression protected by s 14 of the New Zealand Bill of Rights Act 1990. We agree with the reasoning of Palmer J in *Sellman v Slater* on that point.[30] Thirdly, we consider the requisite threshold standard — "more than minor harm" — was correctly identified in the same decision and is to be preferred to a higher standard based on the word "serious".[31]

Publication 14 — lying to the media?

[46] Publication 14 was described above at [25]. Another of the twenty "fair questions" asked by Mr Slater was question five: "Why did you not tell the truth to the media in late 2014 about Larry Baldock and Leighton Baker's departures from the Board and Party?"

[47] The Judge held the pleaded meaning — that Mr Craig lied to the media about why Larry Baldock and Leighton Baker left the party and its board — was not defamatory. After finding Mr Craig had not lied in fact on the topic, the Judge said:[32]

> I am not persuaded, however, that an allegation that Mr Craig, in his capacity as the leader of a political party, had misled the news media on an internal disciplinary issue would be regarded by right thinking members of society as lowering Mr Craig's reputation. I find the statement was not defamatory.

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28 *CPA Australia Ltd v New Zealand Institute of Chartered Accountants* [2015] NZHC 1854 at [104]–[120]; and *Sellman v Slater* [2017] NZHC 2392, [2018] 2 NZLR 218 at [62]–[69].

29 *Thornton v Telegraph Media Group Ltd*, above n 27, at [51]–[92].

30 *Sellman v Slater*, above n 28, at [67].

31 At [68].

32 High Court judgment, above n 1, at [577].

[48] Mr Miles submits that calling someone a liar is defamatory, because it is widely accepted as impugning a person's honesty and integrity. The courts should not accept reasonable people expect political leaders to lie to the media.

[49] Mr Akel suggests, in response, that the Judge implicitly found that this passage did not have the imputation that Mr Craig was a liar. Further, and taking refuge in a qualification he earlier had contended against, that misleading (as opposed to lying) to the media in relation to a matter of internal party discipline would not be thought to lower Mr Craig's reputation in more than a minor way.

[50] We disagree with the Judge's approach here. We make two points.

[51] First, the passage concerned presumes Mr Craig had not told the truth to the media about the resignations of Messrs Baldock and Baker. It bears the meaning that Mr Craig lied to the media on those matters.

[52] Secondly, and in disagreement with the Judge, we take the view that the statement is defamatory. This is not that rare case where the subject has such a want of veracity that the statement could not affect his credit. We do not accept Mr Akel's suggested exception based on the subject matter being a matter of internal party discipline. We do not think ordinary New Zealanders would accept that limitation. Nor is the state of political practice, or the weariness of the electorate, such that ordinary New Zealanders either expect political leaders to lie to them or would not think worse of them if they did so. This challenge succeeds.

Publication 16 — "witch-hunt"

[53] Publication 16 was a *Whaleoil* post, dated 18 July 2015. It was titled, "Behind the Scenes of the Colin Craig Catastrophe" and quoted Mr Stringer saying Mr Craig had led a "relentless and driven witch-hunt" to force Mr Baldock from the party.

[54] Mr Craig pleaded the statement imputed he abused his power and manipulated the resources of the party to pursue a relentless and driven witch-hunt against Mr Baldock without any reasonable cause.

[55] The Judge accepted the reference to a witch-hunt carried the imputation that Mr Craig's actions to remove Mr Baldock were unfair. But he said:[33]

> looking at the publication as a whole, I am satisfied that Mr Slater was directing the piece to an argument that the Conservative Party was so riven by internal strife between prominent members that it had no political future.

[56] Mr Miles submits that the Judge here side-stepped the central inquiry about the impact of the statements. Intent was not material to that inquiry. Rather, the question was whether it would "negatively impact" Mr Craig's reputation. That it did, because it painted him to be vindictive and liable to misuse and abuse his position out of spite.

[57] Mr Akel submits, *contra*, that the Judge was entitled to reject the broader meaning pleaded by Mr Craig in favour of the more confined meaning of "witch-hunt" adopted. This was consistent with the sting of the publication: that the party was so riven by internal strife it had no future.

[58] We think Mr Miles' complaint is well made. The gravamen of the passage is the expression "witch-hunt". In context, that conveys to an ordinary reader that Mr Craig used his position as leader of the party, unfairly and vindictively, to target and remove Mr Baldock from his positions as parliamentary candidate, board member and, then, party member. That imputation attacks Mr Craig's credit for good judgment and fairness, qualities expected of a political leader. It would tend therefore to affect his reputation adversely, and in more than a merely minor way. This challenge succeeds.

Issue three: Did the High Court apply the correct approach to determining whether publications were "true, or not materially different from the truth"?

[59] It is convenient to start with an example of the Judge's approach to the defence of truth advanced by Mr Slater, and then consider whether it was correct in law.

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[33] High Court judgment, above n 1, at [589].

"Sexts"

[60] Publication 1 was a *Newstalk ZB* radio interview with Mr Slater, on 19 June 2015. In it, Mr Slater said that he had "copies of sext messages, you know, dirty text messages" that Mr Craig had sent Ms MacGregor. This he said was "quite untoward behaviour" for a politician who had placed himself on the ethical high ground.[34]

[61] Mr Craig pleaded the publication meant that he had sexually harassed Ms MacGregor and that he had sent her "numerous '*dirty'* sexually explicit text messages, which were unsolicited and a form of sexual harassment". The Judge held that the publication bore that meaning, and that it was defamatory.[35]

[62] The complaint is about the next step in the Judge's reasoning, in dealing with the defence of truth. The Judge said:[36]

> … The imputation that Mr Craig sent "dirty text messages" to Ms MacGregor was not strictly true, but only so far as the medium of communication is concerned. The medium by which the messages were communicated is immaterial to the aspect of the statement that is defamatory.
>
> The essential sting of the statement, taking the publication as a whole, is that Mr Craig sexually harassed Ms MacGregor by sending her, in writing, sexually oriented messages that were unsolicited. In all material respects, the statement is substantially true.

[63] Mr Miles submits "sexts" and the letters in fact sent were materially different: the letters were "flirtatious", albeit unsolicited, but not sexually explicit "sexts". Indeed Mr Slater himself had distinguished between letters and the non-existent "sexts". Had Mr Slater said that Mr Craig had sent "inappropriate messages", the defence might have been made out.

[64] Mr Akel submits the difference between unsolicited sexualised letters and "sexts" is not material, that the medium is not relevant, and that the publication was substantially true.

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34 Mr Slater made similar allegations in publications 4, 6, 7 and 11 which were accepted as defamatory but true. Our determination of the truth of the "sext" allegation in publication 1 applies equally to the same allegation in these publications.

35 High Court judgment, above n 1, at [386] and [389].

36 At [446]–[447].

[65] Where truth is pleaded, the defendant does not need to prove each and every word within the publication is true. Section 8(3) of the Defamation Act 1992 provides that a defence of truth shall succeed if the imputations were true or "not materially different from the truth". As *Todd on Torts* observes:[37]

> The defendant must prove the truth of the sting of the defamation, but it will not defeat the defence if he or she cannot prove the truth of some minor details in his or her allegations which are immaterial as far as injury to the plaintiff's reputation is concerned.

[66] In an old case, a publication that mis-stated the sentence following conviction by a period of one week's imprisonment was held nonetheless to be justifiable.[38] The inaccuracy was immaterial. By contrast, another case where a book review claimed that the plaintiff had spent most of the past 15 years in jail, whereas he had spent only one year in jail, was plainly unjustifiable.[39] In a third case, the publication was that a car dealer had wound back odometers on imported cars. All that could in fact be proved was that the plaintiff had knowingly sold cars with odometers that had been wound back by someone earlier in the supply chain. This Court said:[40]

> … once knowledge of the tampering is established, there is no material additional sting. … [I]mporting or offering for [sale] cars known to have their odometers rewound is not materially different from an allegation of rewinding. In both cases the importer is party to the deception in New Zealand which is based upon the rewinding. The suggestion that the importer was directly responsible for the "clocking" is not materially different from the truth.

[67] We do not think there is cause here to embark on a narrow examination of the methodologies of sexual harassment. Responsibly, Mr Miles said he was not challenging for one moment the evidence of Ms MacGregor that she did not want the sexually suggestive (if not explicit) letters that she was sent by Mr Craig. In fact, as the evidence demonstrates, he also sent her some text messages of the same ilk. None of these communications were particularly explicit, or "dirty", but they were unquestionably sexualised in nature. As the pleading reflects, the essential sting in the publication was that messages suggesting sexual or sexualised contact had been

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37 Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at 916. See also Alastair Mullis and Richard Parkes (eds) *Gatley on Libel and Slander* (12th ed, Sweet & Maxwell, London, 2013) at 400–403.

38 *Alexander v North Eastern Railway Co* (1865) 6 B&S 340, 122 ER 1221 (QB).

39 *Mihaka v Wellington Publishing Co (1972) Ltd* [1975] 1 NZLR 10 (SC).

40 *Pepi Holdings Ltd v BMW New Zealand Ltd* CA21/97, 25 August 1997 at 37.

transmitted. That is the essence of a "sext", to an ordinary reader. A sext may or may not be unsolicited, but the clear implication of the publication was that those sent here were unsolicited, and amounted to sexual harassment, as the Judge correctly found. Whether the medium is digital or epistolary makes no difference to injury to reputation. This challenge fails.

"Six-figure" settlement sum

[68] In the same radio interview Mr Slater said that the harassment had been of a "sexual nature", and that Mr Craig had settled for a "large sum of money, I'm told it runs into six figures". He also said that such a sum would not be paid if the dispute was an employment related one: "You don't do six-figure sums for settlement of employment matters".[41]

[69] Mr Craig pleaded that the publication meant that he had sexually harassed Ms MacGregor so seriously that he had settled her sexual harassment claim by paying her a large sum of money running into six figures. The Judge accepted that a reasonable reader would infer, from the publication that the sexual harassment claim had been settled by a payment of a large sum running into six figures, that the alleged harassment was of a serious kind.[42]

[70] The Judge found that the financial settlement between Mr Craig and Ms MacGregor involved a sum of $16,000 (inclusive of GST) in settlement of a larger claim in relation to unpaid invoiced fees, and the forgiveness of debt of approximately $19,000, which was unrelated to Ms MacGregor's pay claim.[43] Later in his judgment, the Judge said:[44]

> The statement that Mr Craig paid Ms MacGregor a six-figure sum is not true, but the material element of the allegation – the sting – is that Mr Craig provided Ms MacGregor with a substantial financial benefit in exchange for her not pursuing a justifiable claim that he had been guilty of sexual harassment.

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41 Similar allegations of large or six figure payments were accepted as being made in publications 7 and 9. In publication 6, the accepted imputation was that the settlement was "tens of thousands of dollars" more than [Mr Craig] told the board about. In publication 14, the accepted imputation was the Mr Craig paid Ms MacGregor a "large sum".

42 High Court judgment, above n 1, at [386]–[387].

43 At [458].

44 At [459].

The Judge held the imputation was not materially different from the truth substantiated on the evidence.[45]

[71] Mr Miles submits that there was no six-figure or large payment, and even if the $19,000 forgiveness of debt could be seen as a payment to settle the sexual harassment claim, which was disputed, it was at a materially different level than Mr Slater's portrayal. This is not a case in which a large sum of money, anywhere near six figures, had been paid to silence Ms MacGregor.

[72] Mr Akel submits that the Judge was entitled to find that Mr Craig made a substantial financial settlement in exchange for the withdrawal of the sexual harassment claim to the Human Rights Commission. That, Mr Akel says, was the sting of the publication and it was not in substance materially different from the truth.

[73] In our view, the difference between publication and fact here was material. Mr Slater repeated the "six figures" reference three times in the course of the interview, to emphasise the self-acknowledged seriousness of Mr Craig's behaviour. An ordinary listener or reader would measure the seriousness of the sexual harassment by the sum paid to settle, and that it must have been very serious indeed to warrant a six-figure settlement. In fact, all that could be established was that a sum of $19,0000 may have been exchanged because, or in part because, of Mr Craig's misconduct. This is not a distinction without a material difference. This challenge succeeds with respect to the "six-figure" allegations in publication 1, and publications 7 and 9.

[74] The challenge fails with respect to the slightly different imputations in publications 6 and 14. In publication 6, the imputation was that Mr Craig paid "tens of thousands" more than he told the board he had paid. The payment of $19,00, because or in part because of Mr Craig's conduct is not materially different from this allegation which is of a significantly different order than the "six-figure" allegation. Similarly, the imputation of a "large" payment in publication 14, bereft of the "six-figure" quantification, is of a significantly lesser order than the imputations in publications 1, 7 and 9, and not materially different from the truth.

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[45] At [460].

Lied to the board about payments

[75] Also in publication 1, Mr Slater said that Mr Craig had told the board that the sum paid was substantially less than six figures and was for a settlement of employment matters.[46]

[76] Mr Craig pleaded that the publication meant that he had lied to the board by claiming he had paid Ms MacGregor substantially less than six figures to settle her employment claims when in fact he had paid her a six-figure sum to settle a sexual harassment claim. The Judge found that meaning made out.[47]

[77] Later in his judgment, the Judge held:[48]

> [I]n disclosing to the board only that he (or Centurion) had paid Ms MacGregor $16,000 to settle her pay claim, Mr Craig deceived them. Having reported to the board that Ms MacGregor had made a "ridiculous" sexual harassment claim, he deliberately misled Ms Rankin [chief executive of the party] and the board about the true nature of the issues between Ms MacGregor and him, and about how they were resolved …

[78] In particular he held that Mr Craig had withheld from the board highly relevant information about the nature of the communications he had sent to Ms MacGregor, the fact that he and Ms MacGregor had engaged in intimate sexual conduct in November 2011, that Mr Craig had thereafter put in place "boundaries" to ensure that conduct was not repeated, that he continued however to communicate a romantic and sexual interest in Ms MacGregor by emails, in person and by letter, that she had made a formal complaint to the Human Rights Commission, that a mediation had been conducted under the Human Rights Act which he had participated in, that the settlement agreement included acknowledgment that some of his conduct had been inappropriate (for which he had apologised), that he had written off Ms MacGregor's loan and that Ms MacGregor had not withdrawn her sexual harassment allegations (although she had withdrawn her complaint).

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46 Similar imputations that Mr Craig had lied to the board about how much he paid Ms MacGregor were accepted in publications 6 and 14 and had lied to the board about his conduct towards Ms MacGregor in publications 6, 7 and 9. Our determination of the truth of the imputation in publication 1 applies to these imputations in these publications.

47 High Court judgment, above n 1, at [386].

48 At [465].

[79] The Judge went on:[49]

> The maintenance of Mr Craig's political credibility depended on the board's acceptance that Ms MacGregor's allegations of sexual harassment were baseless and a product of her infatuation with him. Agreeing on a financial settlement to stop her claim from proceeding implied that Mr Craig accepted that the claim had merit. I am satisfied Mr Craig knew that if the board understood the true nature of his behaviour with and towards Ms MacGregor, the foundation and merits of Ms MacGregor's allegations against him, and the true nature of the settlement with her, the information would be exploited to his considerable political disadvantage by those on the board and within the Party who did not support him. It was inevitable that Mr Craig would suffer major reputational and political damage if the facts became known to the public. As well, such publicity would cause major harm to the political party he had founded and in which he had invested a considerable amount of his time, energy and financial resources. That is why he granted Ms MacGregor a substantial financial benefit in exchange for:
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> (a) the withdrawal of a sexual harassment claim that had a genuine foundation and merit; and
>
> (b) an agreement that Ms MacGregor would keep both the nature of her allegations and the terms of the settlement confidential.

[80] The Judge therefore found the imputation materially true in substance.[50]

[81] Mr Miles submits that while Mr Craig did not disclose the fact that he had forgiven payment, the omission did not mean that Mr Craig had lied to the board, particularly when he had disclosed to the board that he was restrained by the confidentiality agreement and was limited in what he could say. Mr Miles submitted that there was a clear difference between deliberately lying to the board and not being able to tell the board all the information around the settlement. The defence of truth should have failed because the pleaded imputation could not be made out.

[82] Mr Akel, on the other hand, submits that the Judge was correct in finding it was materially true in substance that Mr Craig had misled the board intentionally about the true nature of his behaviour with and towards Ms MacGregor.

[83] We do not think the Judge's analysis can be faulted. The settlement agreement provided that its terms were strictly confidential between the parties, and that neither would comment (on the settlement) to third parties other than that they had met and

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49 At [466].
50 At [467].

resolved their differences. We do not see those terms as precluding Mr Craig from giving a truthful account of his behaviour to the board. The suggestion that this instrument, in part manufactured by him, precluded his giving that truthful account, cannot sensibly be sustained. And it did not give him licence to mislead the board by saying that Ms MacGregor's claims were "ridiculous", and (as Mr Akel put it) leading them to believe that the claims were baseless and the product of her infatuation with Mr Craig.

[84] The question now is whether there is a material disparity between the facts proved and the defamatory meaning found by the Judge. We do not think that there is. The relevant sting here concerns the alleged actions of lying to the board in relation to the claim made by Ms MacGregor. The fact that Mr Craig was partly truthful in denying payment of a six-figure sum does not alter the reality that the sting is more than sustained by the facts proven. This challenge fails.

Mr Craig's actions were serious sexual harassment

[85] The primary defamatory imputation of Publication 1 was that Mr Craig had seriously sexually harassed Ms MacGregor.[51] The Judge held that imputation to be true, finding Mr Craig's conduct amounted to "moderately serious" sexual harassment.[52] Though Mr Craig may have been encouraged by Ms MacGregor's response to a letter sent in February 2012, his attentions were unwelcome thereafter.[53] Though Mr Craig sought to reassure Ms MacGregor she would not lose her job over rejecting his further advances following the 2011 election night, the power imbalance in the workplace relationship meant Ms MacGregor chose not to complain for that very reason.[54] Though not the primary factor, the harassment was an operative factor in Ms MacGregor's decision to resign.[55]

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51 Similar defamatory allegations were made in publications 6, 7, 9, 10 and 12. Our findings on the truth of the sexual harassment imputation in publication 1 applies equally to the truth of the sexual harassment imputations in those publications.

52 High Court judgment, above n 1, at [457]. A summary of Mr Craig's relevant conduct can be found at [442].

53 At [450]–[452].

54 At [450] and [457].

55 At [454]–[457].

[86] The Judge concluded:[56]

> In summary, I find that Mr Craig sexually harassed Ms MacGregor on multiple occasions from early 2012 to 2014 by telling her that he remained romantically inclined and sexually attracted to her, and that those expressions of his views were not welcomed by Ms MacGregor at the time they were communicated to her. Ms MacGregor chose not to complain about the harassment because of concern about the effect of a complaint on her employment.
>
> …
>
> Mr Craig's continuing indications after 2011 that he retained a romantic interest and sexual attraction were unwanted by Ms MacGregor and wrong. I have found that Ms MacGregor chose not to complain about the harassment because of concern about the effect of a complaint on her employment. Although the manner of the harassment was not at the higher end of the scale of seriousness, it had serious consequences for Ms MacGregor in that it was an operative factor in the loss of her job, and Mr Craig's post-resignation behaviour aggravated the harm she suffered. Moreover, as I have held, the seriousness of the harassment is aggravated by its origins in an abuse of power in a workplace relationship. I assess the sexual harassment as moderately serious.

[87] With some diffidence Mr Miles submits the sexual harassment here was not serious. He submits, first, that Mr Craig's conduct should be judged by the higher standard of what amounted to serious sexual harassment prior to the #MeToo movement. Secondly, Ms MacGregor did not make it known to Mr Craig that his letters and comments were unwelcome; rather, she responded positively to the letters. Thirdly, there was never any indication Ms MacGregor's employment would be at threat if she complained.

[88] Mr Akel submits, *contra*, that this is a matter of credibility and impression the trial Judge was best placed to evaluate. The fact Mr Craig did not know the advances were unwelcome is irrelevant to establishing sexual harassment and therefore also to establishing severity. He failed to appreciate the power imbalance and how that affected Ms MacGregor's responses to his actions.

[89] We do not think the Judge's analysis can be faulted in this matter either. The Judge was sensitive to the possibility that the meaning of "sexual harassment" had changed, and expanded, since publication in June 2015, because of the #MeToo

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56 At [443] and [457].

movement.[57] The test he applied was appropriate to publication in mid-2015. On any view, Mr Craig's conduct was intentional, sexualised conduct directed at a workplace subordinate. The Judge was also right to hold that where a complaint of sexual harassment involves an allegation of intentional sexualised conduct or language, and there is a power imbalance favouring the perpetrator over the recipient, it is reasonable to draw a rebuttable inference that the sexual conduct or language was unwelcome, whether the complainant objected at the time of the alleged harassment or not.[58]

[90] In this case, although Ms MacGregor did not make it known that Mr Craig's advances were unwanted, the Judge was perfectly entitled to find on the evidence before him that she did not do so because of her concerns over losing her job. Mr Craig was aware she was in some financial difficulty. That resulted in his making the loan to her in February 2014 and taking over management of some of her finances.[59] The Judge's analysis has not been shown to have erred; accordingly, this challenge fails.

Counterclaim

[91] It is unnecessary for us to address truth as a defence to Mr Slater's counterclaim. Mr Craig prevailed in his defence to that claim on other grounds, and his success is not put in issue in this appeal.[60]

Issue four: Did the High Court err in finding the defence of honest opinion applied to publication 16?

[92] This issue concerns a publication we have considered already, namely the *Whaleoil* post that quoted Mr Stringer as saying Mr Craig had led a "relentless and driven witch-hunt" to force Mr Baldock from the party. Earlier in this judgment we held these words to have attacked Mr Craig's credit for good judgment and fairness, and that they would tend to affect his reputation adversely, in more than a minor way.[61]

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57 At [410]–[411].
58 At [23(a)(iv)], [402] and [411(d)].
59 At [144].
60 See above at [10].
61 Above at [58].

[93] The Judge however considered the words were "expressions of Mr Stringer's opinion, quoted as background to the opinions Mr Slater then expressed". As Mr Slater genuinely believed the opinion, the publication was honest opinion.[62]

[94] Mr Miles submits that, in context, Mr Slater presented the quoted passage as fact, rather than opinion. Only statements clearly expressed as opinion are protected by the defence.[63] Secondly, the defence protects only opinion based upon facts referred to in the publication which are proved to be true (or not materially different from the truth) or on other facts generally known at the time of the publication and proved to be true.[64] Yet the Judge here qualified opinion based on "Mr Stringer's opinion". Thirdly, even if presented as opinion, the supposed facts on which it was based were not true.

[95] Mr Akel submits that the sting of the publication was that the party was so riven by internal strife that it had no future. Secondly, this sting was Mr Slater's genuine opinion based on Mr Stringer's blogs. Thirdly, the true fact relied upon was the fact of Mr Stringer's opinions, rather than the opinions themselves.

[96] We consider there is force in each of Mr Miles' points. The defence cannot be founded upon the opinion of another, as opposed to facts either referred to in the publication or otherwise generally known. In publication 16 Mr Slater does not use the fact of Mr Stringer's opinions as a basis for his own opinion. Rather, he recycles the opinions of Mr Stringer. They are bookended with a few observations of his own — in particular, that Mr Stringer's diatribe "goes to show the delicious and totally misdirected witch hunt that took place". Mr Stringer's opinion cannot serve as foundation for Mr Slater's attempted honest opinion defence. This challenge succeeds.

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62 High Court judgment, above n 1, at [589].
63 *Mitchell v Sprott* [2002] 1 NZLR 766 (CA) at [17].
64 At [22].

Issue five: Did the High Court err in finding the responsible public interest communication defence applied to publications 1, 6, 7, 9 and 16?

[97] In *Durie v Gardiner* this Court recognised a new defence, responsible public interest communication.[65] The nomenclature indicates the primary elements of the defence: the subject matter must be of public interest, and the communication must be responsible, albeit it has proved not to be true. The defendant bears the onus of proof on both issues. The defence is available to all published material of public interest in any medium, and the defence was deliberately not styled as one of responsible journalism.[66] As to the first element, this Court observed that the Judge should step back and look at the thrust of the publication as a whole to determine whether it was of public interest. A separate public interest in each element of the publication was not required. The second element, responsibility of communication, was to be determined having regard to all relevant circumstances of the publication. The Court offered a non-exhaustive list of circumstances that may be taken into account:[67]

> (a) The seriousness of the allegation — the more serious the allegation, the greater the degree of diligence to verify it.
>
> (b) The degree of public importance.
>
> (c) The urgency of the matter — did the public's need to know require the defendant to publish when it did, taking into account that news is often a perishable commodity.
>
> (d) The reliability of any source.
>
> (e) Whether comment was sought from the plaintiff and accurately reported — this was described in *Torstar* as a core factor because it speaks to the essential sense of fairness the defence is intended to promote. In most cases it is inherently unfair to publish defamatory allegations of fact without giving the target an opportunity to respond. Failure to do so also heightens the risk of inaccuracy. The target may well be able to offer relevant information beyond bare denial.
>
> (f) The tone of the publication.
>
> (g) The inclusion of defamatory statements which were not necessary to communicate on the matter of public interest.

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65 *Durie v Gardiner* [2018] NZCA 278, [2018] 3 NZLR 131.
66 At [59].
67 At [67].

[98] An associated defence of neutral reportage may exist as part of the wider defence. The majority observed:[68]

> In the context of a situation where the public interest concerned lies in the fact the allegation was made, rather than the truth of its contents, the publisher may be relieved of the usual responsibility obligation of attempting to verify the contents as distinct from verifying the making of the allegation but that is not the end of the responsibility inquiry. The court will also consider whether, viewing the publication as a whole, the publishers have made it clear they do not subscribe to any belief in the truth of the allegation and have not adopted it as their own. Relevant considerations will include whether the source of the information is disclosed in the publication and the tone of the publication, including whether the allegations have been embellished. Timing may also be relevant. If, for example, the allegation or its context was stale or there was some other ulterior reason for the timing of the publication, then reportage may not be available even if the report was otherwise full, fair and neutral.

[99] In the present case the Judge held the responsible public interest communication defence applied to publications 1, 6, 7, 9 and 16.[69] The defence of truth has been sustained however in relation to most of publication 1, apart from the "six-figure" settlement allegation. We need not consider the application of the responsible public interest communication defence to the other parts of that publication. Publication 6 is essentially the same as publication 1, except for an additional and false claim that chaperones were appointed (to protect Ms MacGregor). Publication 7 is similar to publication 1 but adds (by recycling Mr Stringer's email to the party board) an untrue allegation that there were "other women" (that is, plural) who were victims of Mr Craig's sexual harassment. Publication 9 is essentially the same as publication 1. Publication 16 is the "witch-hunt" allegation. So we are dealing, relevantly, only with settlements, chaperones, other women and a witch hunt.

[100] By contrast, Mr Slater failed to establish the responsible public interest communication defence for publications 4, 10, 12 and 14. These were publications that Mr Craig had pressured Ms MacGregor to sleep with him and sexually harassed other women. The Judge noted that Mr Slater had made no enquiry of Ms MacGregor or any other reasonably reliable source before publishing these enlarged allegations, or sought comment from Mr Craig. Publishing them was reckless, not responsible.[70]

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68 At [71].
69 High Court judgment, above n 1, at [494], [524], [533], [538] and [589]–[590].
70 At [514], [558]–[559], [565] and [580].

[101] Mr Craig did not dispute the public interest in statements about his conduct in the context of his role as leader of a political party.[71] The focus of the judgment below, and this appeal, is whether Mr Slater communicated those statements with sufficient responsibility to attract the defence.[72] All counsel accept the Judge's finding that Mr Slater should not be subject to a lower standard of responsibility than the mainstream media.[73]

[102] Mr Miles submits the Judge erred in four ways. First, he failed to give sufficient weight to Mr Slater's failure to verify and put the allegations to Mr Craig or Ms MacGregor for comment. Secondly, he gave too much weight to Mr Williams and Mr Stringer as sources, despite Mr Slater knowing them to be unreliable and have an agenda. Thirdly, he wrongly treated publications 6, 7 and 16 as reportage of Mr Stringer's opinions, but the reportage principle did not apply. Fourthly, he was wrong to find Mr Slater could simply report Mr Stringer's statements featuring in mainstream media (publication 6) without any further verification.

[103] Mr Akel disagrees. He submits there may be legitimate differences in opinion whether this defence applies, which means this Court, without the benefit of full evidence, should defer to the lower Court. Secondly, the failure to seek comment was not irresponsible given Mr Craig's media profile allowed him readily to refute the allegations. Thirdly, Mr Slater could rely on Mr Williams and Mr Stringer because they were credible sources of information about the party's workings and their agendas were commonplace in politics. Fourthly, Mr Slater's quoting or paraphrasing of Mr Stringer's comments was irrelevant as it was the fact of the comments that carried public interest. Fifthly, Mr Slater could rely on prominent mainstream media outlets to verify Mr Stringer's comments with respect to publication 6.

[104] We are satisfied the Judge erred in finding the defence made out for these publications. For the reasons given at [99], we are concerned only with publications 1, 7 and 9 ("six figure" settlement), 6 ("chaperones"), 7 ("other women") and 16 ("witch-hunt"). We make five points.

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71 At [471].
72 At [472]–[489].
73 At [479]–[484].

[105] First, the publications we are concerned with all involve incorrect enlargement by Mr Slater from verifiable facts. Publication 1 ("six-figure" settlement") was pure embroidery. Mr Williams had told him a settlement sum had been paid, having apparently obtained that information from Ms MacGregor. Neither Mr Williams nor Mr Slater knew how much had been paid. Yet Mr Slater told the radio news host, "… he has settled with a former staff member [for] a large sum of money, I'm told it runs into six figures". In evidence he explained he assumed it would be of that order because it was settlement of a Tribunal case. As sheer embroidery by Mr Slater, without a reliable source, it does not readily engage the defence.

[106] Secondly, Mr Slater did not embroider or confabulate in relation to publication 6 ("chaperones"), because that was a repetition of a statement by Mr Stringer on a TV3 *The Nation* news interview earlier that day. But the allegation was in fact groundless and Mr Slater did not call Mr Stringer to give evidence. The same goes for publication 7, in which Mr Slater republishes Mr Stringer's email to the party board, including an allegation that other women had been sexually harassed. The same can be said of Mr Stringer's allegation in the same email that Mr Craig paid Ms MacGregor a large or six-figure sum, and the same "six-figure" allegation made by Mr Stringer and republished by Mr Slater in publication 9. Publication 16 ("witch-hunt") is also a repetition of remarks by Mr Stringer and associated assertion as fact that such a witch hunt has occurred. The application of the defence to these publications is dependent on whether Mr Stringer was a reliable source. But as the Judge observed, Mr Slater "knew Mr Stringer was an outspoken critic of Mr Craig, both publicly and within Conservative Party circles, and highly antagonistic towards him".[74] Mr Slater had reason to think he was unreliable: in cross-examination he said that "I take anything that John Stringer says with teaspoonfuls of salt", and that "he's an idiot. He's probably got a complete clown suit in his wardrobe". And, he said he wouldn't use the word "accurate" to describe Mr Stringer, and that he was sometimes deluded.

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[74] At [579].

[107] Thirdly, as this Court said in *Durie v Gardiner*, "the more serious the allegation, the greater the degree of diligence [needed] to verify it".[75] The Court also observed:[76]

> The stakes for publishers — mainstream or otherwise — who do not attempt to verify the truth of the defamatory allegation are high. They are likely to do so at their peril and accordingly the incentive to make the attempt remains high.

Diligent effort at verification is the heart of the defence. Without evident efforts to do so — on which the publisher bears the onus of proof — the defence is unlikely to be engaged. Here, no steps were taken by Mr Slater to verify the five publications with which we are now concerned. He does not appear to have spoken to Mr Stringer about his contributions, but simply recycled them with his own commentary. He did not speak to Ms MacGregor. He spoke to Mr Williams about the settlement sum, but made up the "six-figure" remark based on assumptions about settlements following Tribunal claims.[77]

[108] Fourthly, Mr Slater cannot fall back on the associated defence of reportage of Mr Stringer's remarks in the case of publications 6, 7 and 16. Reportage is a subset of the responsible public interest communication defence, relieving the publisher of the usual and stringent need to attempt diligently to verify.[78] But it is in turn dependent on two things: (1) a studied neutrality in the reporting and (2) that "the public interest in the fact of the allegation is overwhelming and so compelling on its own that urgent reporting of it is justified without further investigation".[79] Neither element is satisfied here, in relation to the peripheral, untrue allegations in publications 6, 7 and 16, the content of which Mr Slater adopts for the purposes of the commentary he makes on Mr Stringer's remarks.[80]

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75 *Durie v Gardiner*, above n 65, at [67(a)].

76 At [77].

77 Mr Williams did not offer a number. Had he, it might have been regarded with reserve. Mr Slater described Mr Williams thus in evidence: "Jordan sometimes unfortunately is prone to a bit of exaggeration so you have to take everything he says with a grain of salt".

78 *Durie v Gardiner*, above n 65, at [71].

79 At [76].

80 We note also that the Judge's finding that the defence applied to publication 7 ("other women") cannot we think stand alongside his later finding that it did not apply to publication 10, making a like allegation (directly, rather than simply by repetition of Mr Stringer): High Court judgment, above n 1, at [558]–[560]. Similarly, by implication, publications 12 and 14: at [565] and [576].

[109] Fifthly, in *Durie v Gardiner* we noted that one relevant — indeed core — consideration was whether comment was sought from the plaintiff — that is, Mr Craig. This was described as:[81]

> [speaking] to the essential sense of fairness the defence is intended to promote. In most cases it is inherently unfair to publish defamatory allegations of fact without giving the target an opportunity to respond.

Mr Slater did not put the allegations to Mr Craig. We reject the argument that Mr Craig's media profile allowed him readily to refute the allegations. That shuts the stable door after the horse has bolted. Nor do we accept the Judge's reasoning that Mr Slater was entitled, by reason of Mr Craig's evasiveness on the issue, to assume that asking for comment would be futile.[82] If Mr Slater's sole failing was this, it might weigh in the balance. But the absence of the step is simply consistent with the general want of care, and responsibility, demonstrated by Mr Slater.

[110] These failings mean the defence cannot succeed in relation to the remaining, unprotected aspects of publications 1, 6, 7, 9 and 16. This challenge succeeds.

Issue six: Did the High Court err by failing to award Mr Craig damages?

[111] As we have noted, the Judge held Mr Slater liable in defamation for two statements: that Mr Craig had placed Ms MacGregor under financial pressure to sleep with him, and that he had sexually harassed at least one other victim.[83] But he declined to award Mr Craig damages, reasoning that Mr Craig's reputational loss was caused almost entirely by his own actions, and a declaration would be adequate vindication.[84]

[112] It should be observed that the effect of this judgment is to enlarge Mr Slater's liability to Mr Craig for the following additional defamatory publications: the "six-figure" settlement sum (publications 1, 7 and 9), the imposition of "chaperones" (publication 6) the "ticking timebomb" description, meaning Mr Craig was a danger to women (publication 10), the allegation Mr Craig had engaged in electoral dishonesty and lied to the media (publication 14) and the statement about the "witch

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81 *Durie v Gardiner*, above n 65, at [67(e)].
82 High Court judgment, above n 1, at [493].
83 These statements were made in publications 4 and 10 and repeated in publications 12 and 14.
84 High Court judgment, above n 1, at [652].

hunt" (publication 16). Publications 7 ("other women") and 15 (repetition of allegation of sexually harassing women) are additional to, but encompassed by, the second finding noted above at [111].

[113] Mr Miles submits the Judge erred in two respects. First, it is wrong as a matter of law to not award damages, even if only in a nominal amount. The failure to do so meant the verdict was defective.[85] Secondly, the Judge erred in the assessment of damages. The untrue allegations caused further reputational damage beyond that caused by the true allegations, and the Judge incorrectly considered a later Human Rights Review Tribunal report (determining a claim brought by Ms MacGregor) as damaging Mr Craig's reputation. The report had not been formally produced, nor did it exist at the time damages needed to be assessed: that is, at the time of publication.

[114] Mr Akel submits this Court should be reluctant to interfere in the trial Judge's evaluative assessment of, and decision to not award, damages. First, the publications concerning the sexual harassment of Ms MacGregor were true. That damage was self-inflicted and (along with the also true statements about his misleading the board) catastrophic to the reputation of a self-professed public guardian of morality. While the "traditional approach" was that it was contrary to principle not to award damages (even if nominal) where defamation is found, a declaration was an appropriate remedy where the defence of truth had been established on the key allegation and the other publications were peripheral. That remedy had in fact been the primary remedy sought on each cause of action. Secondly, the assessment of damages was correct. The reputational damage of the true and untrue allegations could not be isolated, and the untrue allegations received significantly less publicity than the true allegations, excluding the publicity Mr Craig himself gave them. The Tribunal report was put to Mr Craig in cross-examination; there was no prejudice from it failing to be produced formally. The fact that it was published after the defamatory statements was irrelevant: damages are assessed at trial and a plaintiff's conduct up to and during the hearing may be considered.

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[85] *Television New Zealand Ltd v Keith* [1994] 2 NZLR 84 (CA) at 88.

[115] Mr Akel also submitted that if damages are to be reassessed, this Court should do it pursuant to s 33 of the Defamation Act. The Judge had retired. But s 33(1) requires the consent of all relevant parties. Mr Craig does not consent to that course, and Mr Slater did not participate. That route is not open to us.

[116] We are satisfied that the Judge erred in not awarding damages. We make four points.

[117] First, a nil damages award where defamation has been established is a defective verdict. In *Reynolds v Times Newspapers Ltd* Lord Bingham CJ held that: [86]

> [We] think it right to say that in our judgment the judge was correct in his ruling that a plaintiff who is successful in a libel action must be awarded some damages, even if they amount to no more than the smallest coin of the realm. Proof of actionable libel necessarily imports a finding of some damage: see *Wisdom v Brown* (1885) 1 TLR 412; *Martin v Benson* [1927] 1 KB 771, 772. For a jury to find that a plaintiff has been libeled but to award no damages whatsoever would be contrary to both principle and authority.

Although this point does not seem to have been considered explicitly in New Zealand, we see no justification for departing from this long-established rule of common law.[87] And while it is correct that the statement of claim sought declarations first, Mr Craig also sought damages and there is no indication before us that he disclaimed what otherwise would be the right to some measure of damages if his claims were (as they were) upheld. As Lord Judge CJ said in *Cairns v Modi*:[88]

> There will be occasions when the judgment will provide sufficient vindication, but whether it does so is always a fact-specific question. The judge will be well placed to assess whether the terms of the judgment do indeed provide sufficient vindication in the overall context of the case. In the present case, we think it unlikely that cricket fans will have downloaded the judgment of Bean J and read it with close attention. It is more likely, as in so many cases, that the general public (or rather, interested "bystanders" who need to be convinced) will be concerned to discover what might be called the "headline" result. What most people want to know, and that includes those who read the judgment closely, as Mr Caldecott submitted, is simply "how much did he get?"

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86 *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (EWCA) at 159.

87 In *Television New Zealand Ltd v Keith*, above n 85, this Court had to deal with a trial verdict finding defamation but purporting only to award legal costs. The latter were not in the jury's gift. The verdict was defective and a new trial was ordered.

88 *Cairns v Modi* [2012] EWCA Civ 1382, [2013] 1 WLR 1015 at [32]. See also *Cruddas v Adams* [2013] EWHC 145 (QB) at [43].

[118] Secondly, we accept Mr Miles' submission that, despite proof in evidence of sexual harassment of Ms MacGregor and the misleading of the party board, the remaining untrue allegations would have caused further reputational damage to Mr Craig calling for some measure of compensation. To that must now be added the further publications this judgment finds Mr Slater liable for.[89] So any assessment of damages will need to take those further publications into account.

[119] Thirdly, we do not accept the complaint made about the admissibility of the Tribunal report. The document was not in the common bundle, but was put to witnesses without objection at trial.[90] It was the subject of cross-examination, and then questioning from the bench. Counsel cross-examining Mr Craig indicated it would be produced in due course, but apparently omitted to do so. The omission of that formality is not determinative in these circumstances. We will have regard to it.

[120] What is more important is whether the report, and the publicity it engendered, is really relevant in assessing damage to Mr Craig's reputation. We think however that the point has been overanalysed. The report added nothing material to what was readily apparent from the evidence, which was that Mr Craig had indeed sexually harassed Ms MacGregor. At the time the actionable publications were made, it was not known whether that was so or not. Publications imputing sexual harassment at that time were doubtless damaging at that time to the reputation of a politician promoting family values. But evidence of Mr Craig's conduct regarding Ms MacGregor prior to the publications complained of (which began on 19 June 2015) was admissible to show bad character and to diminish the damage to reputation for which compensation might be claimed.[91] As it happened the claim brought by Mr Craig provided the forum for an adverse reassessment of his character and reputation in June 2015. In *Williams v Craig*, dealing with an imputation against Mr Williams, this Court observed:[92]

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89 See above at [111]–[112].

90 High Court Rules 2016, r 9.6.

91 *Plato Films Ltd v Speidel* [1961] AC 1090 (HL) at 1131 and 1140–1142.

92 *Williams v Craig* (CA), above n 4, at [48]. Although an appeal from that judgment was allowed, the decision of the Supreme Court does not alter the principle expressed: *Craig v Williams*, above n 4.

> A damages award should restore Mr Williams' reputation to the status it ought to have enjoyed if this element of his character was known publicly. The law must be concerned with the reputation he deserved and compensate accordingly.

[121] We do not think, therefore, that this is the occasion for this Court to reconsider the extent to which events subsequent to publication may be taken into account in assessing damages for reputation, and this Court's prior decisions in *Television New Zealand Ltd v Quinn* and *Television New Zealand Ltd v Ah Koy*.[93] It is unnecessary to do that here, because the subsequent Tribunal report is of no material relevance.

[122] Fourthly, for the reasons given at [115], it is necessary for us to set aside the verdict below on relief and (in the absence of consent otherwise) remit that issue for determination in the High Court. While it is a matter for that Court, we observe that we see no justification for the calling of further evidence on the issue. All relevant evidence touching on relief should have been before the Judge below.

Issue seven: Did the High Court err in its costs judgment?

[123] The Judge held Mr Craig's defamation claim against the respondents failed, except to a minor extent.[94] His Honour awarded costs to Mr Slater but reduced them as he failed in relation to an issue which significantly increased Mr Craig's costs.[95]

[124] As to Mr Slater's counterclaim against Mr Craig, the Judge found that succeeded in the sense that Mr Craig's statements were defamatory and untrue. But Mr Craig's defence of qualified privilege based on a proportionate response to attack succeeded in whole. The Judge found each party succeeded and failed in more or less equal measure. He ordered costs for the counterclaim lie where they fell.[96]

[125] Mr Cleary, who argued the costs issue, submits the Judge applied the costs discretion contrary to principle. First, Mr Craig's partial success in his claim was still success, and partial success should be recognised by a reduction in costs or ordering

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93 *Television New Zealand Ltd v Quinn* [1996] 3 NZLR 24 (CA); and *Television New Zealand Ltd v Ah Koy* [2002] 2 NZLR 616 (CA).
94 Costs judgment, above n 6, at [45].
95 At [47]–[48].
96 At [52]–[53].

costs lie where they fall. But not by reversing costs altogether. Second, the Judge's approach to partial success differed between the apportionment of costs for the main claim and counterclaim.

[126] Mr Akel submits costs are a matter of discretion, and the Judge's approach was not plainly wrong.

[127] It is axiomatic that the award of costs involves judicial discretion.[97] But it is a limited or fettered discretion: as the Supreme Court has observed, it is a fundamental principle that costs follow the event and any departure from that course will be exceptional.[98]

[128] The effect of the present appeal being allowed is that Mr Craig has enjoyed rather greater success on the principal claim than he did in the High Court, and that the costs award must be set aside. The High Court will need, therefore, to reconsider costs on that claim ab initio. In doing so it will need to consider whether a more appropriate award in the circumstances would have been substantially reduced costs awarded to Mr Craig, bearing in mind that Mr Craig has achieved some success, but failed on the primary planks regarding his alleged conduct towards Ms MacGregor and towards the board.[99]

[129] We are, however, clear that the Judge's award on the counterclaim cannot stand. There are two objections to it. The first is that the conclusion is inconsistent with that reached on the primary claim. The second is that in the case of the counterclaim, there can be no basis on which to displace the ordinary rule that costs should follow the result. The result in the case of the counterclaim is that Mr Craig has succeeded entirely. That he should have done so by means of the defence of qualified privilege rather than the defence of truth does not matter.

[130] Accordingly, we remit costs on the counterclaim to the High Court, to be reconsidered in light of the terms of this judgment.

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97 High Court Rules, r 14.1.
98 *Manukau Golf Club Inc v Shoye Venture Ltd* [2012] NZSC 109, [2013] 1 NZLR 305 at [8].
99 *Weaver v Auckland Council* [2017] NZCA 330, (2017) 24 PRNZ 379 at [26].

Conclusion

[131] In this judgment we conclude the High Court erred:

(a) in finding publications 10, 14 and 15 did not bear the meanings alleged by the appellant;[100]

(b) in finding the meanings alleged in the case of publications 14 and 16 were not defamatory;[101]

(c) in finding truth established in the case of publications 1, 7 and 9 ("six-figure" settlement sum);[102]

(d) in finding honest opinion established in relation to publication 16;[103]

(e) in finding responsible public interest communication established in relation to publications 1, 6, 7, 9 and 16;[104]

(f) in failing to award damages to Mr Craig;[105] and

(g) in failing to award costs to Mr Craig on his successful defence of Mr Slater's counterclaim—[106]

and we remit damages and costs in the High Court for redetermination in that Court in light of the terms of this judgment.[107]

[132] Although the appeal has met with considerable success, the very comprehensive judgment of Toogood J is substantially sustained. The distinction reflects the eminently sensible, surgical approach taken by Mr Miles in limiting

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100 Above at [24], [33] and [43].
101 Above at [52] and [58].
102 Above at [73].
103 Above at [96].
104 Above at [110].
105 Above at [116].
106 Above at [129].
107 Above at [122], [128] and [130].

the scope of his attack. We express our appreciation to Mr Miles, Mr Akel and their juniors.

Result

[133] The appeal is allowed, to the extent set out at [131].

[134] The appellant is entitled to costs in this Court for a standard appeal on a band A basis plus any disbursements. We certify for second counsel.

[135] Damages are remitted for redetermination in the High Court, along with costs therein, in light of the terms of this judgment.

Solicitors:
Chapman Tripp, Auckland for Appellant

Publication	Statements
1	"Look the allegations are true, I wouldn't have run these if they weren't." "… the documentary proof is irrefutable and these allegations are not actually allegations they're what's actually happened. Where he has settled with a former staff member a large sum of money, I'm told it runs into 6 figures." "And I also have copies of sext messages, you know dirty text messages that have been sent as well." "… but everybody says its 6 figures. Now you don't do 6 figure sums for settlement of employment matters which is what Colin Craig told the board, and he also told the board a substantially lower amount of money as well." [Larry Williams]: "Text, emails, letters?" [Cameron Slater]: "Yes" [Larry Williams]: "And the nature of them again is what? Is it sexual harassment?" [Cameron Slater]: "… the staff member concerned rebuffed the approaches but it was, the harassment was of a sexual nature." "… so there's plenty of evidence." "But the documents and the evidence is clear. There's no way that he can deny it."
4	"There is simply so much more to come. There are financial issues, contractual issues, sleight-of-hand with loans, GST rebates and other strategic trickery. And that's all before the nasty stuff, like letters written by a married man to beg another woman for an affair. And then no longer begging, but putting pressure on this woman financially. TXT messages. Unsolicited and unwanted. Some so lewd they are SXT messages."
6	"… the untruths of Colin Craig …"; "… for constantly covering up and misleading the board about his actions." "'That is completely untrue, because the board has discussed this almost monthly for nearly a year,' Mr Stringer said." "Worse than untrue, a deliberate lie. Craig has also misled the board over the amount of the settlement and the nature of the settlement. He has told the board one amount that is many tens of thousands of dollars away from the real settlement amount." "Having a chaperone, which I am told was at the request of Rachel McGregor, just provides even more evidence of the creepy behaviour of Colin Craig." "Chaperones had been appointed to Mr Craig" "as txt, sxts and more musings from 'Creative Colin' make their way into the public view."
7	"… to discuss these matters (that are of some years standing). We had documentary evidence in the form of hand written notes, letters signed by Colin, his SXTs and emails for you to see, and I wanted to hear Colin's side of the story." "… a man who is morally bankrupt and has lied to us as a Board for months and months." "The explicit and salacious details of Colin's indiscretions with women other than his wife will be leaked out every day over the next several days by several media outlets and from numerous sources. His large payout to one victim is already being discussed." "… as his victims begin to speak out."
9	"This confirms Colin Craig has lied to the Board repeatedly over several months when specifically asked if anything was sexual or inappropriate. He has always strenuously denied any impropriety." "There remains confusion over what was paid and for what … $16,000; or $36,000; or approx, $50,000; or a six figure payment paid as one lump sum."
10	"I also happen to know that there is at least one other victim out there with similar circumstances…so Colin Craig is just a ticking

	time bomb. Guys like this never have just one victim no matter how hard they try to keep everyone silent." "… through his extremely poor and disgusting behaviour toward women."
11	"I bet she won't be so forgiving when the sext bombs start dropping."
12	"There are rumours swirling around that because Craig won't take 'no' for an answer, and he is essentially re-victimising MacGregor, a second wave of revelations are heading our way." "We are only just getting to know the one who misuses his power over subordinates to try and sleep with them."
14	"3. Are you confident you have been honest in your filing of all Electoral Returns in accordance with the Act, and have you been totally honest about amounts and invoicing to keep electorate campaigns under cap?" "4. Do you categorically deny the new rumours emerging about a second sexual harassment case against you by another of your female employees?" "5. Why did you not tell the truth to the media in late 2014 about Larry Baldock and Leighton Baker's departures from the Board and Party?" "7. Why did you arrange a loan to yourself at 8% interest to cover this amount, and not lay this at the Board, but rather rang around your supporters by phone, and excluded those you knew would question this? Was that a 'Board meeting' in your mind?" "15. If there was no veracity to the Sexual Harassment Claim filed against you by a female employee, why did you make a large payout to the claimant and why was it necessary for all details to be hidden by a strict confidentiality agreement?" "16. Why did you cover up and misdirect the Board as to the nature of this payout, when it took place, what it was for, and how much was involved, if you are innocent of all claims?"
15	"Hmmm…I haven't withdrawn any of my allegations…neither has John Stringer as far as I am aware. In fact I stand by everything I have stated."
16	"'It was well known around the Board for some time, that 'Larry is gone…you'll be next, John, followed by RM and then Brian.' Of course, that is exactly what happened. Colin witch-hunted ex-MP Larry Baldock out of the Party…" "At first this was directed at Larry, who was sacked as a candidate, sacked from the Board, and then suspended from the Party. A relentless and driven witch-hunt." "But it goes to show the delicious and totally misdirected witch hunt that took place."
17	"… the truth is quite the best defence, and now he's forcing me to pull his life apart bit-by-bit inside a court room." "… we have only dealt in verifiable fact …".